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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~440~~. 182.

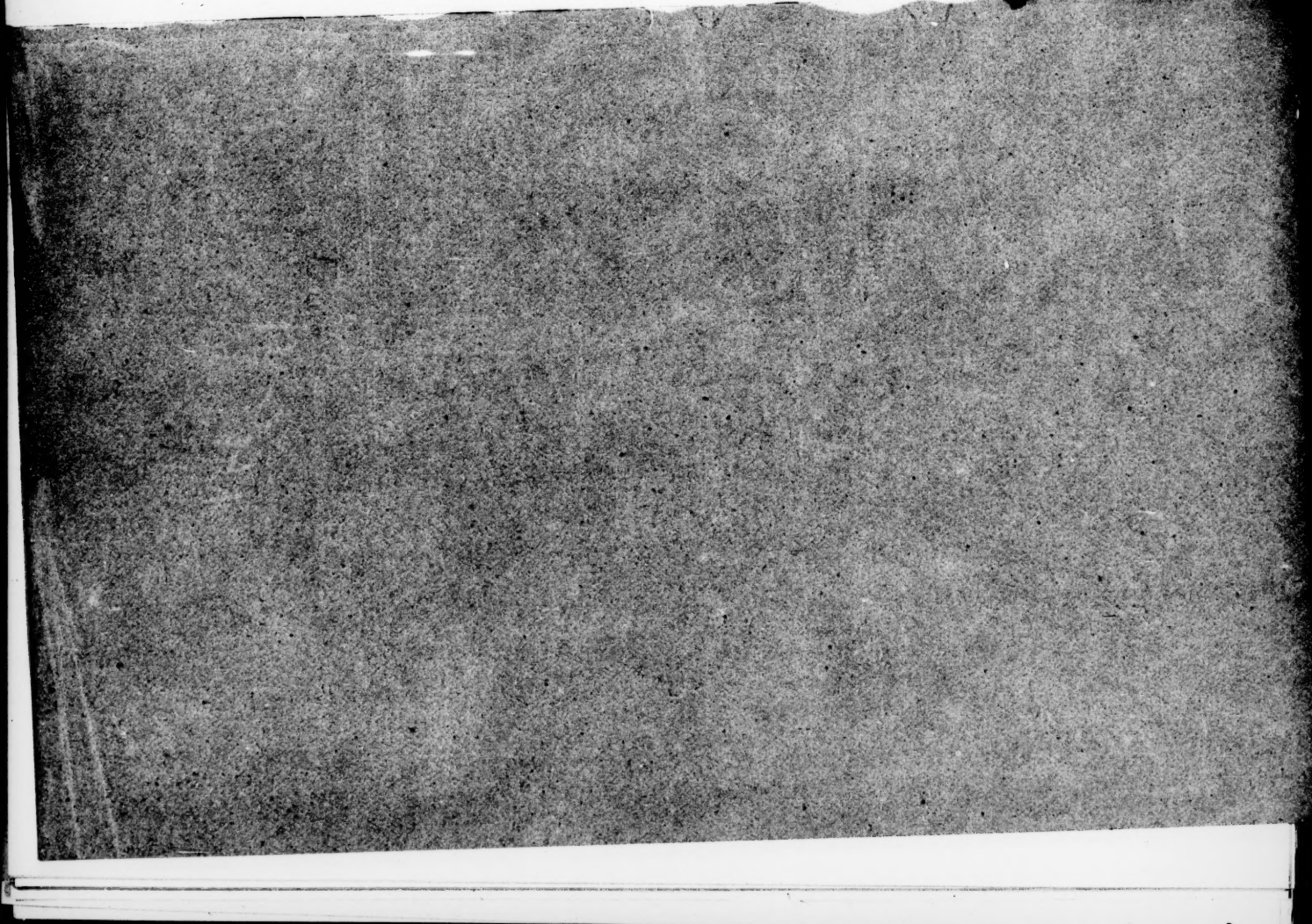
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

E. P. PHILLIPS, JOHN CARDWELL, AND DENNIS CORWIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED OCTOBER 19, 1883.



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OCTOBER TERM, 1885.

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E. P. PHILLIPS, JOHN CARDWELL, AND DENNIS CORWIN.

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1 *Proposals for military supplies.*

OFFICE OF CHIEF QUARTERMASTER,
DEPARTMENT OF TEXAS,
San Antonio, Texas, March 21, 1881.

Sealed proposals in triplicate, subject to the usual conditions, will be received at this office, or at the offices of the quartermasters at the following-named posts, until 12 o'clock, noon, on the 4th day of May, 1881, at which time and places they will be opened in presence of bidders for furnishing and delivery of military supplies as required during the fiscal year commencing July 1st, 1881, and ending June 30th, 1882, as follows:

Wood, charcoal, grain, hay, and straw (or hay in lieu thereof), or such portions of said supplies as may be required at the San Antonio depot, at Forts Brown, Clark, Concho, Davis, Duncan, McIntosh, McKavitt, Ringgold, and Stockton, and at the subposts of San Diego, San Felipe, Pena Colorado; Mayer's Spring, mouth of Rio Pecos, and Camp near Presidio, Texas. Proposals for either class of the supplies mentioned, or for
2 quantities less than the whole required, will be received.

The Government reserves the right to reject any or all proposals.

A preference will be given to articles of domestic production.

Bidders will state what deduction they will make in the prices proposed for such portion of the grain as the Government may find it convenient to furnish sacks in which it may be delivered.

Blank proposals with printed circulars, stating the kind and estimated quantities required at each post, and giving full instructions as to manner of bidding, conditions to be observed by bidders, and terms of contract and payment, will be furnished on application to this office or to the quartermasters at the various posts named.

No proposal will be considered unless accompanied by a bond made according to the form prescribed.

Envelopes containing proposals should be marked: Proposals for ——— at ———, and addressed to the undersigned, or to the respective post quartermasters.

B. C. CARD,
Chief Quartermaster.

3 *Proposal for corn at Fort Concho.*

AUSTIN, TRAVIS COUNTY, TEXAS,
May 2nd, 1881.

To the CHIEF QUARTERMASTER, DEPARTMENT OF TEXAS,
San Antonio, Texas:

SIR: In accordance with your advertisement of March 21, 1881, inviting proposals for military supplies, and subject to all the conditions and requirements thereof, and of your circular to bidders dated March 21st, 1881, copies of both of which are hereto attached, and so far as they relate to this proposal are made a part of it * * * propose to furnish 26,785 bushels of corn at Fort Concho, from June 1st, '81, to Dec. 31st, '81, 105 cents (one dollar and five cents) per bushel, deducting 5c. per sack if furnished by the Government, and from January 1st, 1882, to

June 30th, 1882, 97 (ninety-seven) cents per bushel. Erasures before signing. I make this proposal with a full knowledge of the kind,
4 quantity, and quality of the articles required, and if it is accepted will, after receiving written notice of such acceptance, enter into a contract within fifteen days after date of such notice, with good and sufficient sureties, for the faithful performance thereof.

(Signature) E. P. PHILLIPS,
(Address) *Austin, Travis Co., Texas.*

Bidders' bond.

Know all men by these presents that E. P. Phillips as principal, and Dennis Corwin, of Austin, county of Travis, and State of Texas, and John Cardwell, of Austin, county of Traverse, and State of Texas, as sureties are held and firmly bound unto the United States of America in the penal sum of seventy-five hundred dollars, to the payment of which well and truly to be made we do bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents.

5 Given under our hands and seals this 2' day of May, 1881.

The condition of this obligation is such that whereas the above bounden E. P. Phillips, in response to a public advertisement, and notice dated March 21, 1881, and given and published by Major B. C. Card, quartermaster U. S. Army, has made and presented to Maj. B. C. Card, qmr., U. S. Army, a formal proposal in writing, whereby he has proposed and agreed to enter into a contract with Maj. B. C. Card, qmr., U. S. Army, acting for and representing the United States, to furnish corn at Fort Conch' according to the terms and conditions set forth in said advertisement and notice.

Now, therefore, if the said E. P. Phillips shall not withdraw his said proposal within sixty days from the date of opening the proposals, and shall, within fifteen days from the date on which he may be notified that his said proposal has been accepted and the said contract awarded them (provided such award be made within sixty days above mentioned) duly and formally entered into such contract, agreeably to the terms of
6 his said proposal, and into such bond for its due performance as shall be required of him; or if his proposal shall not be accepted and such contract not be awarded him, then this obligation shall be void; otherwise, that is to say if either he shall withdraw his proposal within said sixty days, or fail to enter within fifteen days into such contract if awarded and into such bond, to remain in full force, effect, and virtue.

E. P. PHILLIPS. [L. S.]
DENNIS CORWIN. [L. S.]
JOHN CARDWELL. [L. S.]

Witnesses:
W. J. MATHEWS.
N. S. WALTON.
N. J. WALTON.

Justification of the sureties.

STATE OF TEXAS,
County of Travis, ss:

I, Dennis Corwin, one of the sureties named in the within bond, do

swear that I am pecuniarily worth the sum of seven thousand five hundred dollars, over and above all my debts and liabilities.

DENNIS CORWIN.

Before me,

N. S. WALTON,
Notary Public, Travis County, Texas.

STATE OF TEXAS,
County of Travis, ss:

7 I, John Cardwell, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of seven thousand five hundred dollars, over and above all my debts and liabilities.

JOHN CARDWELL.

Before me,

N. S. WALTON,
Notary Public, Travis County, Texas.

Certificate.

I, P. M. Ruthrauff, P. M., do hereby certify that Dennis Corwin and John Cardwell, the sureties above named, are personally known to me, and that, to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

P. M. RUTHRAUFF,
Postmaster, Austin, Texas.

NOTE.—The certificate may be given separately as to each surety, and modified accordingly.

Requirements and circular to bidders.

The following are the estimated quantities that will be required at each place, according to the present distribution of troops; but in case
8 of removal of garrison or of other causes, the quantities actually required may be less.

	Wood.	Charcoal.	Oats or barley.	Corn.	Hay.	Straw or hay in lieu thereof, for bedding.
	Cords.	*Bush.*	*Pounds.*	*Pounds.*	*Tons.*	*Tons.*
Brown, Fort	1,600	350	200,000	400,000	375	115
Clark, "	2,200	2,000	900,000	1,800,000	1,600	300
Couch, Ft	2,000	2,000	700,000	1,500,000	1,400	300
Davis, Ft	1,650	1,500	486,000	1,600,000	1,400	300
Duncan, Ft	560	300	150,000	490,000	400	100
McIntosh, Ft	500	800	200,000	400,000	320	80
McKavett, Ft	1,000	1,000	120,000	240,000	200	95
Ringgold, Ft	700	1,000	320,000	640,000	625	125
Stockton, Ft	*1,200	1,200	800,000	800,000	1,050	250
San Antonio	2,000	4,500	1,000,000	1,000,000	1,500	300
Subposts:						
San Diego	200	400	138,000	270,000	200	60
Pend. Colorado	100	300	80,000	160,000	130	10
San Felipe	320	300	112,000	370,000	210	50
Camp near Presidio	100	300	20,000	40,000	....	....
Mouth Rio Pecos	200	200	25,000	50,000	80	15
Mayer's Spring	225	120	33,000	66,000	80	15

*Three thousand pounds of wood to the cord at Ft. Stockton. Information in regard to the supplies will be furnished to all persons desiring it on application to the undersigned, or to the offices of the quartermasters at the several posts named in the advertisement.

9 All grains to be well sacked ; the oats in good, new burlaps, the corn in good, new gunnies, or American "A" seamless sacks. All supplies to be inspected on behalf of the United States at the place of delivery. Wood to be sound, merchantable hard wood, cut in length of 4 feet, 128 cubic feet of piled wood to the cord (except at F't Stockton), small branches of recent gro'th, which have not hardened into old wood, to be excluded. Elm wood will not be received.

Hay to be received by weight, and stacked by the contractor, at his expense, in conical stacks, not to exceed fifteen tons in each stack. Bids for baled hay, as well as loose, will be received and considered. Preference will be given to cultivated hay.

Straw to be good, clean merchantable straw, to be received by weight, and stacked by the contractor at his expense, in such sized stacks as the receiving officer may require.

Deliveries to commence, if so required, within thirty days after notice of award of contract has been given.

10 In making payment to the contractor for supplies delivered a voucher or vouchers, equal to about one-tenth of the amount of each contract, will be withheld until completion of contract. Proposals will be prepared in strict accordance with the requirements made known in the advertisement and circular to bidders, which will be attached to the proposal and form part of it. All prices must be written as well as expressed in figures.

The prices bid must include the cost of package and delivery.

Alteration by erasures or interlineations should be explained or noted in the proposal over the signature of the bidder.

Proposals should be signed by the bidder submitting them, with his usual signature in full.

When a firm is a bidder the member of the firm or agent who signs the firm name to the proposal should state in addition the name of all the individuals composing the firm.

Any one signing a proposal as the agent of another or others must file with it legal evidence of his authority to do so.

11 The place of residence of every bidder, with county and State, must be given after his signature.

Separate bids must be made for each post, in triplicate, for each article. The right to reject any and all bids is reserved. Transfers of contracts, or of any interest in contracts, are prohibited by law. The bidder must furnish satisfactory evidence of his ability to furnish the supplies.

Blank forms of proposals and contracts can be had on application to the quartermasters of the posts named or to the undersigned, and bidders are expected to make their bids with a full knowledge of the obligations of such contracts.

Concerning bonds.

12 In all cases where bonds are required from bidders no proposal will be considered unless accompanied by a bond made according to the form prescribed. Every bidder's and contractor's bond must be executed by the bidder or contractor, as principal, and two responsible persons as sur*i*ties. Each obligor and sur*i*ties shall affix to his signature a formal seal of wax or other adhesive substance.

Each signature of obligors and surities shall be attested by at least one witness; when practicable, by a separate witness to each signature.

The surities are to make and subscribe affidavits of justification on the back of the bond; the sum in which they jointly justify to be double the amount of the penalty; the affidavit to be taken before any official or person authorized by laws of the United States, State, Territory, or district, to administer oaths.

The justification shall, if practicable, be followed by the certificate of a judge of a United States court or United States district attorney, or in their absence by some other civil official of the United States, who shall certify that the surities are known to him, and that, to the best of his knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in his affidavit of justification. But, if necessary or more convenient, separate certificates may be furnished as to each surity.

13 A firm will not be accepted as a surity, nor will a partner be accepted for a copartner, or for a firm of which he is a member.

B. C. CARD,
Chief Quartermaster.

SAN ANTONIO, TEXAS,
March 21, 1881.

14 Original petition with exhibit, filed Jan'y 4th, 1882, M. Hopkins, clerk, is endorsed as follows, to wit: "No. 1874½. United States vs. E. P. Phillips, Dennis Corwin, John Cardwell," and is in words as follows, to wit:

UNITED STATES
vs.
E. P. PHILLIPS, DENNIS CORIOM, JOHN Cardwell.

In circuit court of the United States for the 5th circuit and western district of Texas, holding sessions in the city of Austin, in said district, at its June term, A. D. 1882.

And now comes the United States of America, by her attorney, Andrew J. Evans, and complains to the honorable judge of said court of one E. P. Phillips, and one Dennis Corwin, and one John Cardwell, each and all of whom are resident citizens of Travis County, and State of Texas, and the western district of Texas, and the Austin division thereof, for that whereas the said defendants heretofore, to wit, on the second day of May,

15 A. D. 1881, at the city of Austin, in said district, by their certain bond and writing obligatory, of date the year and date last aforesaid, sealed with the seals of the said defendants, which said bond and writing the said plaintiff now brings here into court and shows to the court, acknowledged themselves to be held and firmly bound unto the said plaintiff in the full and just sum of seventy-five hundred dollars, for the payment of which the defendants bound themselves, their heirs, ex'utors, administrators, jointly and severally, firmly, by these presant'.

And the plaintiff says that the said writing obligatory is and was sub-

ject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit: That the condition of this obligation is such that, whereas the above bounden E. P. Phillips in response to a public advertisement and notice dated March 21st, 1881, and given and published by Maj. B. C. Card, quartermaster U. S. Army, have made and prompted to Maj. B. C. Card, Qr. Mr. U. S. Army, a formal proposal in writing whereby he has proposed and agreed to enter into a contract
16 with Maj. B. C. Card, Qr. Mr. U. S. Army, acting for and representing the said United States, to furnish corn at Fort Concho, to wit, "26,785 bushels of corn at Fort Concho from June 1st, 1881, to Dec'r 31st, 1881, 105 cents (one dollar and five cents) per bushel, deducting 5c. per sack if furnished by the Government, and from June 1st, 1882, to June 30th, 1882, 97c. (nin'ty-seven cents) per bushel (erasures before signing) according to the terms and conditions set forth in said advertisement and notice: Now, therefore, if the said E. P. Phillips shall not withdraw his said proposal within sixty days from the date of opening the proposal, and shall within fifteen days from the date on which he may be notified that his said proposal has been accepted, and the said contract awarded to him (provided such award be made within the sixty days above mentioned), duly and formally entered into such contract agreeably to the *to the* terms of his said proposal, and into such bond for its due performance as shall be required of him, or, if his proposal shall not be accepted and such contract not awarded him, then this obliga-
17 tion shall be void; otherwise, that is to say, if either he shall withdraw his proposal within said sixty days, or fail to enter within said fifteen days into such contract if awarded, and into such bond, to remain in full force, effect, and virtue."

And the said plaintiff for assigning a breach of the conditions of the said bond and writing obligatory, in fact says that after the making of the writing obligatory, and upon the acceptance by the plaintiff of the bids and proposal of th' said E P. Phillips at the opening of the annual bids in May, 1881, for the supplies of the War Department, and after due notice to the said Phillips that his proposal and bid, to wit, to furnish "26,785 bushels of corn at Fort Concho, from June 1st, 1881, to Dec. 31st, 1881, 105 cents (one dollar and five cents) per bushel, deducting 5c. per sack if furnished by the Government, and from January 1st, 1882, to June 30th, 1882, 97c. (ninety-seven cents) per bushel," had been accepted, he, the said E. P. Phillips, did wrongfully fail, refuse, and neglect,
18 within fifteen days, and for all other time "to duly and formally enter into such contract agreeable to *to* the terms of his said proposal, and into such bond for its due performance as shall" (was) be required of him.

By reason of which said several promises the said writing obligatory became forfeited, and the said plaintiff have sustained damages to a large amount, to wit, the amount of seventy-five hundred dollars, and thereby an action hath accrued to the said plaintiff to have and to demand of the defendants the said sum of seventy-five hundred dollars.

Yet the said defendants, though often requested to so do, have not yet paid the same or any part thereof to the plaintiff, but to so do have failed; and the plaintiff prays notice hereof, and that she have and recover of and

from the said defendants the said sum of seventy-five hundred dollars, the sum forfeited and due to her, and all her costs, &c., &c., and that she have her judgment, &c., &c.

Plaintiff files herewith the original bid and proposal of the said E. P. Phillips and the bond or writing obligatory sued upon and make
19 the same a part and parcel of her complaint, or pleading, and will use the same in evidence, marked Exhibit A.

ANDREW J. EVANS,
U. S. Att'y, West. Dist. Texas.

Citation, issued January 6th, 1882, to E. P. Phillips. Endorsed: No. 1,874½. In the U. S. circuit court for the western district of Texas, at Austin, holding sessions. United States vs. E. P. Phillips et al. Citation to E. P. Phillips, county of Travis. Issued Jan'y 6th, 1882. M. Hopkins, clerk.

No. 1874½. United States circuit court, western district of Texas.

The President of the United States to the marshal of the western district of Texas, greeting:

You are hereby commanded to summon E. Parris Phillips, a resident citizen of Travis County, western district of Texas, if to be found in your district, to be and appear before the honorable the circuit court of the United States, at a court to be holden in and for the western district
20 of Texas, at the city of Austin, on the first Tnesday of June next, to answer the petition and complaint of the United States of America, and who sue on bond, a copy of the petition and exhibit being hereto annexed, against E. P. Phillips principal, and Dennis Corwin and John M. Cardwell sureties, who are resident citizens of the county of Travis, western district of Texas, and who are sued. Of which you will serve said defendant with the accompanying copy of said petition and exhibit and copy of this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at the city of Austin, this 6th day of January A. D. eighteen hundred and eighty-two, and 106th year of the Independence of the United States of America.

[L. S.] M. HOPKINS, *Clerk.*

The marshal's return endorsed thereon in words, to wit:,
21 Received in office 6th day of January, 1882. Executed on the 17th day of April, 1882, by handing to the within named defendant, in person, a true copy of this writ, and a copy of the petition attached, both certified to by the clerk of the court, under the seal of the court.

STILLWELL H. RUSSELL, *U. S. M.*,
By JNO. RUSSELL, *Deputy U. S. M.*

Filed, 6th day of June, A. D. 1882.

M. HOPKINS, *Clerk*,
By SAM. HOPKINS, *Dep'ty.*

Citation in like manner issued to Dennis Corwin. Endorsed, No. 1874½. In U. S. circuit court for the western district of Texas, at Austin holding sessions. United States vs. E. P. Phillips et al. Citation to Dennis Corwin, county of Travis, issued 6th day of January, 1882. M. Hopkins, cl'k, United States circuit court, western district of Texas.

The President of the United States to the marshal of the western district of Texas, greeting:

22 You are hereby commanded to summon Dennis Corwin, a resident citizen of Travis County, western district of Texas, if to be found in your district, to be and appear before the hon. the circuit court of the United States, at a court to be holden in and for the western district of Texas, at the city of Austin, on the first Tuesday of June next, to answer the petition and complaint of the United States of America, and who sue on bond, a copy of the petition and exhibit being hereto annexed, against E. P. Phillips, principal, and Dennis Corwin and John M. Cardwell, sureties, who are resident citizens of the county of Travis, western district of Texas, and who are sued, of which you will serve the said defendant with the accompanying copy of said petition and exhibit and copy of this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said court *court*, at the city of Austin, this 6th day of January, A. D. eighteen hundred
23 and eighty-two, and in the 106 year of the Independence of the United States of America.

[L. S.] M. HOPKINS, *Clerk.*

Marshal's return endorsed thereon is in words as follows, to wit:

Received in office 6th day of Jan'y, 1882. Executed on the 18th day of April, 1882, by handing to the within-named defendant, in person, a true copy of this writ and a copy of the petition attached, both certified to by the clerk of the court, under the seal of the court.

STILLWELL H. RUSSELL, *U. S. M.*,
By JNO. RUSSELL, *Dep'ty U. S. M.*

Filed this 6th day of June, A. D. 1882.

M. HOPKINS, *Clerk*,
By SAM. HOPKINS, *Deputy.*

Citation in like manner issued to Jno. M. Cardwell. Endorsed: No. 1874½. In U. S. circuit court for the western district of Texas, at Austin, holding sessions. United States vs. E. P. Phillips et al. Citation to Jno. M. Cardwell, county of Travis. Issued 6th day
24 of January, 1882. M. Hopkins, cl'k, United States circuit court, western district of Texas.

The President of the United States to the marshal of the western district, greeting:

You are hereby commanded to summon John M. Cardwell, a resident citizen of the county of Travis, western district of Texas, if to be found in your district, to be and appear before the honorable the circuit court of the United States of America, to be holden in and for the western district of

Texas, at the city of Austin, on the first Tuesday of June next, to answer the petition and complaint of the United States of America, and who sue on bond, a copy of the petition and exhibit being hereto annexed, against E. P. Phillips, principal, and Dennis Corwin and John M.Cardwell, sureties, who are resident citizens of the county of Travis, western district of Texas, and who are sued, of which you will serve the said defendant with the accompanying copy of said petition & exhibit and copy of this writ.

25 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at the city of Austin this 6th day of January, A. D. eighteen hundred and eighty-two, and the 106 year of the Independence of the United States of America.

M. HOPKINS, *Clk.*

Marshal's return endorsed thereon is in words as follows, to wit:

Received in office 6th day of January, 1882; executed on the 18th day of April, 1882, by handing to the within-named defendant, in person, a true copy of this writ, and a copy of the petition attached, both certified to by the clerk of the court, under the seal of the court.

STILLWELL H. RUSSELL, *U. S. M.*,
By JNO. RUSSELL, *Deputy U. S. M.*

Filed 6th day of June, A. D. 1882.

M. HOPKINS, *Clerk*,
By SAM. HOPKINS, *Deputy*.

26 Demurrer of Cardwell and Corwin. Endorsed, No. 1874½. United States vs. E. P. Phillips et al. Filed June 8th, A. D. 1882. M. Hopkins, clk., by Sam. Hopkins, deputy.

And is in the following words, to wit:

UNITED STATES)
vs.)
E. P. PHILLIPS ET AL.)

In the U. S. circuit court at Austin, June term, 1882.

And now come the defendants, Dennis Corwin and John Cardwell, by their attorneys and demur to the petition of plaintiff and say the matters and things as therein alleged are insufficient in law for plaintiff to have and mantain this suit or to warrant the judgment prayed for, and of this they pray the judgment of the court.

And for cause of special demurrer they say that said petition is insufficient in this, that it contains no allegations of the value of the bid described in said petition, by which according to the terms of said bond sued on the penalty is to be determined.

27 And further because there are no proper allegations of a breach of the conditions of said bond. Wherefore they pray judgment of this court and ask to be hence dismissed with the costs.

PENDEXTER & WOOTEN,
Att'y's for Defendants Cardwell & Corwin.

And, further demurring, defendants above named deny all and singular the allegations in plaintiff's petition contained and demand strict proof of the *sum* and of this they put themselves upon the country.

PENDEXTER & WOOTEN,
Att'ys for Corwin & Cardwell.

Letter of authority. Filed 9th day of June, A. D. 1882. Endorsed, to wit, 797, C. Q. M. O. D. T., 1880. Feb'y 21, 1880, War Department. Chief clerk. Authority for advertising "proposals for army transportation" on routes D. T., in papers named and for printing of blanks named within, &c. 15 enc.

And is in the following words, to wit:

28 (Form No. 1, div. of adv.) No. 68, letter of authority, book 8, page 62, War Department, Washington, D. C., February 21st, 1880. Maj. B. C. Card, chief q. m., Dept. Texas, San Antonio, Texas.

SIR: Your advertisement for "proposals for army transportation" (fiscal year 1880–'81, over routes Nos. 1, 2, 3, 4, 5, &c.), dated the day of February, 1880, was received with your communication of the 2d inst. You are authorized to publish the same as amended (observing the rules and regulations of the War Department relative to advertising and job printing, dated January 1st, 1878) for six (6) consecutive insertions in the San Antonio, Texas, Express, New Orleans, La., Times, Austin Statesman, Leavenworth, Kas., Times, St. Louis, Mo., Globe Democrat; four (4) consecutive insertions in the Brownsville, Texas Democrat, Waco, Tex., Register, and to have printed copies of the following blanks, viz, 150 copies of proposals, &c., 100 copies of contract route No. 3, 100 copies of contract route 1, 100 copies of contract route No. 4, 100 copies of contract route No. 2, 100 copies of contract route No. 5, and 100 copies

29 of contract for water route. When the advertisement is rendered complete by inserting the date and the day for opening bids, Maj. Card will please forward such amended copy of the same to this office. Printed copies of the advertisement herewith, which you will forward to the papers named, with instructions to "follow copy."

By order of the Secretary of War.

(Signed) H. T. CROSBY,
Chief Clerk.

A true copy.

S. O. CAMPBELL,
Capt. & At'-G'n'l.

Letter filed 9th day of June, A. D. 1882, and is in the following words, to wit:

HEADQUARTERS DEPARTMENT OF TEXAS,
JUDGE ADVOCATE'S OFFICE,
San Antonio, Texas, October 17th, 1881.

Hon. A. J. EVANS,
U. S. district attorney, San Antonio, Tex.:

DEAR JUDGE: Enclosed I return the paper in the case of the United States versus Thomas Carson, and I find the following authorities gov-

ering the subject, viz: By the act of March 3, 1813, January 13, 1862, section 219 and 220 of the Revised Statutes, United States, 1878, the Secretary of War prescribes the general regulations for the transportation of the articles of army supply. By section 1133, Revised Statutes, 1878, the Quartermaster's Department is required to furnish means of transportation for the army and its stores. By the act of Congress, approved April 10th, 1878, copy enclosed, marked A, the Secretary of War is authorized to prescribe rules and regulations in the preparation and submission and opening of contracts, under the War Department, and he may require any bid to be accompanied by a bond in such penal sum as he may deem advisable, &c.

The regulations, authorized under the foregoing act, have been published by the Secretary of War in General Orders No. 72, Headquarters of the Army, of 1879, herewith enclosed, marked B, and under the same the bid of Carson was made. A telegram was to-day sent to the War Department, at Washington, to ascertain when and how the Secretary of War, under act of April 10, 1878, and his regulations, page 13, General Orders No. 72, of 1879, designated or approved amount of penal sum named in the bond at issue. When the answer is received, it will be promptly communicated to you. I trust that this covers all points necessary in the case.

With much respect, your obedient servant,

J. W. JONS,

Captain 24th Infantry, Judge-Advocate, Department of Texas.

And afterward, to wit, on June 8th, 1883, the following entry appears upon the minutes of the court:

THE UNITED STATES
vs.
E. P. PHILLIPS AND SURETIES. } No. 1874½.

On this day this cause comming on to be heard on the general and special demurrers of the defendants herein filed, and the same being fully heard upon argument, it is considered by the court that the plaintiff, the United States of America, cannot have and recover under her pleadings and the bond sued upon the penalty set out in said bond, but that she may have leave to amend her pleadings and set up any special damages that may have accrued to her by virtue of the failure of said E. P. Phillips to give the bond as claimed in plaintiff's petition, and thereupon the plaintiff, by her attorney, declining to amend her pleadings and insisting upon her recovery of the penalty set out in her pleadings as her measure of damages. It is ordered by the court that the general and special demurrers of the defendants be in all things sustained and the plaintiff's complaint and petition be dismissed, to which ruling of the court the United States, by her attorney, in open court excepts and prays that her exception be noti*ce* at large in the record, which here is done, and the plaintiff in open court gave notice of her writ of error to the Supreme Court of the United States, and which is granted in term of the law.

E. B. TURNER,

Judge.

33 Bill of exception, endorsed No. 1874½, United States vs. E. Phillips, Jno. Cardwell & Dennis Corwin. Filed June 8th, 1883. M. Hopkins, clerk, by Sam Hopkins, dep'ty, is in words as follows, to wit:

UNITED STATES OF AMERICA
vs.
E. P. PHILLIPS, JOHN CARDWELL, & DENNIS CORWIN. } No. 1874½.

On this day, June 8th, 1883, this cause coming on to be heard on the general and special demurrers of the defendants herein filed, and the same being fully heard upon argument, it is considered by the court that the plaintiff, the United States of America, cannot have and recover, under her pleadings on the bond sued upon, the penalty set out in said bond, but that she may have leave to amend her pleadings and set up any special damages that may have accrued to her by virtue of the failure of said E. P. Phillips to give the bond as claimed in plaintiff's petition, and thereupon the plaintiff, by her attorney, declining to amend her
34 pleadings and insisting upon her recovery of the penalty set out in her pleadings as her measure of damages, it is ordered by the court that the general and special demurrers of the defendants be in all things sustained and the plaintiffs' complaint and petition be dismissed, to which ruling of the court the United States, by her attorney, in open court excepts, and prays that her exception be noted at large in the record, which here is done, and the plaintiff in open court gave notice of her writ of error to the Supreme Court of the United States, and which is granted in term of the law.

E. B. TURNER,
Judge.

35 I, Matthew Hopkins, clerk of the circuit court of the United States in and for the 5th circuit and western district of Texas, at Austin, certify that the foregoing (34) thirty-four pages and parts of pages contain a full, true, and correct copy of all the proceedings and record had in case No. 1874½, United States vs. E. P. Phillips, Jno. Cardwell, and Dennis Corwin, as they appear of file and record in this court.

In testimony whereof I have hereunto set my hand & the seal of court at Austin, this 8th day of June, A. D. 1883.

[SEAL.]

M. HOPKINS,
Clerk,
By SAM. HOPKINS,
Deputy Clk.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding session at Austin in said district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between The United States, who is plaintiff, and E. P. Phillips, Jno. Cardwell, & Dennis Corwin, who are defendants, No. 1874½ on the docket of said cir-

cuit court of the United States, sitting at Austin in said district, a manifest error hath happened, to the great damage of the said United States, who is plaintiff in error herein, as by her complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the 8th day of June, in the year of our Lord one thousand eight hundred and eighty-three, and seal of our said circuit court at Austin, in the one hundred & seventh year of the Independence of the United States.

Allowed by—

E. B. TURM,
Judge.

[SEAL.]

M. HOPKINS,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By SAM. HOPKINS,
Deputy.

37 (Indorsed:) In the Supreme Court of the United States. United States, pl'ff in error vs. E. P. Phillips, Jno. Cardwell, & Dennis Corwin, deft's in error. Writ of error to Supreme Court of the United States. Issued 8th day of June, A. D. 1883. M. Hopkins, cl'k. By Sam. Hopkins, deputy.

(Indorsement on cover:) No. 440. The United States, plaintiff in error, vs. E. P. Phillips, John Cardwell, and Dennis Corwin. W. Texas, C. C. U. S. Filed 19th October, 1883.

121-254

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
E. P. PHILLIPS, JOHN CARDWELL, AND DENNIS CORWIN.
} No. 182.

ERROR TO CIRCUIT COURT WESTERN DISTRICT TEXAS.

Brief for the United States.

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
E. P. PHILLIPS, JOHN CARDWELL, AND DENNIS CORWIN.
} No. 182.

ERROR TO CIRCUIT COURT WESTERN DISTRICT TEXAS.

Brief for the United States.

THE CASE.

This is an action on a bond given to the United States by the defendant in error Phillips as principal, and the other defendants in error as sureties, in obedience to regulations of the Secretary of War under the act 10th April, 1878 (20 Stat., 36),

requiring bidders for contracts to furnish army supplies to accompany their proposals with bonds in such cases and with such penalties as shall be designated by the Secretary of War (Reg., §§ 1530, 1531, 1532, Ed. 1881. See Appendix).

Petition.

The petition (Rec., pp. 5–7) avers that the bond sued on is for the sum of $7,500, was executed by the defendants on 2d May, 1881, at Austin, Tex., and is subject to the condition, that whereas the said Phillips had, in response to a public advertisement, dated 2d March, 1881, formally proposed in writing to Maj. B. C. Card, a quartermaster in the United States Army, to enter into a contract with said Card, acting for the United States, to furnish 26,875 bushels of corn at Fort Concho from June 1, 1881, to December 31, 1881, at 105 cents per bushel, "deducting 5 cents per sack if furnished by the Government," and from June 1, 1882, to June 30, 1882, at 97 cents per bushel, "according to the terms and conditions set forth in said advertisement and notice." If,

therefore, the said Phillips should not withdraw his proposal within sixty days from the date of opening the bids, and should, within fifteen days from the time of receiving notice of the awarding of the contract to him (provided said award be within said sixty days), enter into the required contract and bond, or if the contract should not be awarded him, that then the obligation should be void, otherwise to be in full force and effect.

The breach assigned is that Phillips failed and refused to enter into the required bond and security within fifteen days after notification of the acceptance of his bid, wherefore the plaintiff claims to have sustained damage to the extent of $7,500, the penalty of the bond, and also claims that the said sum of $7,500 hath become forfeited to it.

The plaintiff makes part of his petition the original bid and proposal (pp. 1–2) of said Phillips and the bond sued upon (p. 2).

All the defendants were served with process (pp. 7, 8, 9), but only the sureties Corwin and

Cardwell appeared. Under the liberal practice of Texas they demurred generally and specially, and at the same time, and by a separate pleading, denied all the allegations of the petition (pp. 9, 10).

The defendant Phillips does not seem to have appeared, and there is no entry of any proceeding against him for his default.

Demurrers.

The general demurrer proceeded on the ground of the failure of the petition to set forth any valid cause of action.

The special demurrer was based on two specifications:

(1) That the petition contained no allegation of the value of the bid mentioned in the petition "by which, according to the terms of said bond sued on, the penalty is to be determined."

(2) That "there are no proper allegations of a breach of the conditions of said bond."

Judgment.

The court sustained the general and special demurrers, and the counsel for the United States declining to amend his petition by setting up any special damage suffered in consequence of the failure of E. P. Phillips to comply with his bid, the court dismissed the petition (p. 11).

Assignment of error.

The judgment is erroneous in that the demurrers should have been overruled.

Argument.

The question arising on this writ of error is, whether the plaintiff's action for the whole penalty of the bond is sustainable without showing that the damage suffered by the breach of the condition of the bond was equal to or exceeded the amount of the penalty.

The circuit court proceeded evidently on the ground that the bond in suit was subject to the equitable principle imported into the common

law by the statute 8 and 9 Wm. 3, ch. 11, s. 8, namely, that the plaintiff's recovery in all actions on bonds conditioned for the performance or non-performance of any thing must be limited to the actual damage proved under one or more breaches assigned, provided the damage so proved do not exceed the penalty of the bond.

The ruling below would have been correct but for the fact that the principle referred to seems to have been displaced and made no longer applicable to contracts like the one sued on by the act of Congress of the 10th April, 1878, entitled "An act to authorize the Secretary of War to prescribe rules and regulations to be observed in the preparation, submission, and opening of bids for contracts under the War Department" (20 Stat. 36), which is in the following words:

> That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department; and he may require any bid to be accompanied by a bond in such penal sum as he may deem advisable, with good and sufficient security,

> conditioned that the bidder will enter into a contract agreeably to the terms of his bid, if the same be awarded to him within sixty days from the date of the opening of the bids, or otherwise pay the penalty. No bid shall be withdrawn by the bidder within the said period of sixty days.

It is respectfully submitted that this statute has, apparently, removed bonds accompanying proposals of bidders for contracts under the War Department from control of the general principle on which the demurrers were sustained.

No doubt the public interests had suffered by the failure of successful bidders for contracts under the War Department to enter into contracts according to the terms of their bids, and that Congress had in view to put a stop to this public inconvenience by requiring the successful bidder to enter into the required contract "*or otherwise pay the penalty*," language which, we submit, must be allowed to have effect according to its clear import. It was, probably, the intention of Congress, in exacting the entire penalty of the bond, to relieve the Government of the incon-

venience of going into evidence as to the extent of its actual damage.

An examination of the Revised Statutes shows instances in which Congress seems to have intended a forfeiture of the entire penalty of the bond as the result of a breach of the condition. Section 3262 provides that, on non-performance of the condition of the bond required of distillers in certain cases, "*the obligors shall pay the amount stated in the bond.*" Section 4576, requiring the master of every foreign-bound vessel to give bond for the return of his crew to this country, evidently contemplates that the penalty of the bond shall be demandable for any breach of the condition. Section 4146, exacting a bond as a condition to the registry of a vessel, and section 3387, exacting a bond from every cigar-maker before commencing business, seem, also, to look to a forfeiture of the entire penalty of the bond for any violation of its condition.

It is unnecessary to inquire whether the omission of the plaintiff to take any steps against the defendant Phillips in consequence of his failure to appear and plead might have produced a discontinuance of the whole suit, because the omission has been cured, it would seem, by both parties treating the suit as still continuing, and because a judgment by default against the defendant Phillips must necessarily have been superseded by the judgment for the other defendants on the demurrers.

It is respectfully submitted that the judgment should be reversed.

WM. A. MAURY,
Assistant Attorney-General.

APPENDIX.

BONDS TO ACCOMPANY PROPOSALS.

1530. Bonds to accompany proposals, pursuant to the act of April 10, 1878, shall be required in such cases, and with such penalties, as shall be designated by the Secretary of War.

1531. In all cases where bonds are required from bidders, no proposal will be considered unless accompanied by a bond made according to the form prescribed.

1532. The condition of the bidder's bond shall be to the effect that the bidder will not withdraw his proposal within sixty days succeeding the date announced in the advertisement or notice for the opening of proposals; and that, if his proposal be accepted and the contract for which he has bid be awarded him, he will enter into a contract and bond agreeably to the terms of his proposal within such number of days after the day on which he is notified of such acceptance and award as may be designated by the officer representing the United States. (See act of April 10, 1878.)